

Petition of Charter Fiberlink MA-CCO, LLC, for  
Arbitration of an Amendment to the Interconnection  
Agreement between Verizon-Massachusetts, Inc., and  
Charter Fiberlink MA-CCO, LLC, pursuant to  
Section 252(b) of the Communications Act, as amended

## I. INTRODUCTION

On July 26, 2006, both parties filed Supplemental Petitions, as allowed by the Arbitrator during the procedural conference held July 20, 2006. In the Supplemental Petitions, both Charter and Verizon identified additional issues to be addressed in the Arbitration. On August 3, 2006, Verizon submitted a response to Charter's Supplemental Petition and asked that the three sub-issues identified by Charter be stricken from the Arbitration as untimely ("Request to Strike") (Verizon Response to Supp. Petition at 1-2). Charter did not respond to Verizon's Supplemental Petition or its Response to Charter's Supplemental Petition. For the reasons set forth below, the Arbitrator denies Verizon's Motion to Dismiss and Request to Strike.

### A. Verizon

Verizon asserts that the Department should dismiss Charter’s Petition. Verizon argues that federal law permits a party to a negotiation to petition a state commission to arbitrate open issues, and that none of the issues cited by Charter currently remain open issues in the negotiations (Verizon Motion at 1, citing 47 U.S.C. § 252(b)(1)). Verizon asserts that Charter

has reneged on agreements reached during negotiations in order to create open issues for purposes of its Petition (id.). Verizon also asserts that the Petition includes new issues that were never raised during the negotiations (id. at 1-2).

With respect to the sub-issues identified in Charter's Supplemental Petition, Verizon requests that the Arbitrator strike the issues because they are untimely. Specifically, Verizon asserts that pursuant to federal law, unresolved issues must be identified at the time a party submits its petition for arbitration (Verizon Response to Supp. Petition at 2, citing 47 U.S.C. 252(b)(2)). In addition, Verizon asserts that Charter had indicated in its Petition that these sub-issues were resolved (id.).

### B. Charter

Charter asks that the Department deny Verizon's Motion and argues that the Motion is based upon erroneous assertions concerning the status of the negotiations and is not supported by legal authority. Specifically, Charter asserts that Verizon is confusing "issue" with "contract language" (Charter Opposition at 2). That is, Charter contends that an issue can be open even though one or both parties have not yet formulated specific language to embody a preferred position (id.). In addition, Charter asserts that Verizon did not offer any evidence that the proposed contract language was accepted and that the issues were resolved (id. at 3). Charter argues that, in fact, the e-mail communications make it clear that there was no agreement on the unresolved issues either prior to, during, or after mediation (id. at 4-7). Charter also contends that Verizon's assertion that certain issues were never raised during negotiations is "simply not true" (id. at 7). According to Charter, several of the issues were raised very early in the negotiation process while other issues were discussed later in the negotiations (id.). Charter also asserts that it noted to Verizon's negotiators on several occasions that it would consider individual issues, but reserved the right to agree or disagree on the entire draft document (id. at 8).

In addition, Charter contends that its Petition complies with federal law (id. at 8, citing 47 U.S.C. § 252(b)(1)). Specifically, Charter asserts that it never finally accepted Verizon's proposed contract language and the parties did not exchange a final draft (id.). Hence, Charter argues that its actions are consistent with federal law (id.).

### III. ANALYSIS AND FINDINGS

Verizon's Motion and Request to Strike raise an issue of first impression for the Department: what constitutes an "open issue" such that it may be included in a Department

arbitration conducted pursuant to 47 U.S.C. § 252?<sup>1</sup> Verizon argues that Charter's Petition and Supplemental Petition contain issues that (1) were never addressed in discussions between the parties prior to the filing of the arbitration petition, or (2) were discussed between the parties prior to the filing of the arbitration petition but were resolved, or (3) are untimely.<sup>2</sup> Charter denies these allegations, asserting that all of the issues it has raised in its Petition and Supplemental Petition were discussed between the parties prior to Charter's filing of its Petition, and that none of the issues were resolved. Because the Arbitrator determines that the Department has jurisdiction under 47 U.S.C. § 252 to arbitrate the issues raised by Charter, as more fully discussed below, Verizon's Motion to Dismiss Charter's Petition for Arbitration and Verizon's Request to Strike the issues in Charter's Supplemental Petition are denied.

A. Open Issues

Pursuant to federal law, incumbent and competitive local exchange carriers are encouraged to negotiate interconnection agreement issues. See, e.g., MCI WorldCom Communications, Inc. v. BellSouth Telecommunications, Inc., 446 F.3d 1164, 1167 (11th Cir. 2006), citing 47 U.S.C. § 251(c)(1). In the event an agreement cannot be reached up until the deadline for submitting a petition for arbitration, any party may petition the state commission to arbitrate any open issues. Id. The Federal Communications Commission ("FCC") and federal law have provided some guidance as to what constitutes an open issue. Specifically, open issues to be addressed in arbitrations have been found to be those issues raised by the parties in petitions for arbitration and in responses to petitions. See, e.g., Petition of WorldCom, Inc., for Preemption of the Jurisdiction of the Virginia State Corporation Commission, Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order, FCC 02-1731 (released July 17, 2002) (FCC determined it was appropriate to arbitrate 180 issues that were raised by competitive local exchange carriers in the initial arbitration petitions and an additional 68 issues that the incumbent local exchange carrier raised in its Answer); U.S. West Communications v. Minnesota Public Utilities Commission, 55 F.Supp.2d 968 (1999) (state commission could not impose requirements of its own choosing and instead was

---

<sup>1</sup> Section 252(b) of the Communications Act of 1934, as amended, states:

During the period from the 135<sup>th</sup> day to the 160<sup>th</sup> day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues. [Emphasis added].

<sup>2</sup> In Verizon's view, because the issues are either new, resolved, or untimely, the issues are not properly before the Department in a Section 252 arbitration as "open issues" (Verizon Response to Supplemental Petition at 2).

limited to arbitrating open issues, which constituted those issues that were raised by the parties themselves in the petition and response).

The Department has also previously determined that it is appropriate to arbitrate all issues raised in a petition for arbitration as well as all issues raised by the responding party in its answer to the petition for arbitration. Consolidated Arbitration, D.T.E. 04-33, Procedural Order at 23 (Dec. 15, 2004). In addition, where the Arbitrator has permitted parties to identify or clarify additional issues, the Department considers these additional issues appropriate for arbitration. As such, the Department has historically taken a broad view on the issues properly included in an arbitration.<sup>3</sup>

Verizon asserts that certain issues were never discussed by the parties prior to the filing of Charter's Petition and that other issues were discussed but were resolved prior to the filing of the Petition. Charter, conversely, asserts that all of the issues were discussed by the parties and that there was no resolution of the issues. In order to determine that the issues were not, in fact, discussed by the parties or that the issues were discussed and resolved, the Department's role would be widened to require investigation of every communication that occurred between the parties prior to the filing of the Petition to ascertain whether an issue was raised in some context. This would be a time-consuming, if not impossible, task. Further, it is inconsistent with the expedited arbitration timeframe. See 47 U.S.C. § 252(b)(4)(C).

In addition, even if Verizon was under the impression that several issues had been resolved, Charter states that there was no agreement. There is nothing in federal law or FCC regulations — and Verizon has not cited to any controlling law — to prevent one party from reconsidering its stance on a particular issue.<sup>4</sup> Further, as Charter points out, it is often the case in negotiations that even though some issues have been resolved, one or both of the parties view such issues as “open” until all of the issues are resolved and agreed to in writing. Parties are required to submit negotiated agreements to the Department for approval. 47 U.S.C. § 252(e). Here, the parties have not submitted an interconnection agreement in

---

<sup>3</sup> We note that Verizon has not alleged that any of the issues raised by Charter are not properly before the Department because they are not among the duties of incumbent local exchange carriers to competitive local exchange carriers as set forth in 47 U.S.C. § 251(b), (c). See Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482 (2003).

<sup>4</sup> The Department has noted that a party that shifts positions in an arbitration runs the risk that there may be no record evidence to support its new position. See MediaOne Telecommunications of Massachusetts, Inc., D.T.E. 99-42/43, 99-52, at 16 (1999) (parties continued negotiation, and in some cases changed positions, after record was closed).

writing for approval by the Department. Without such documentation, the Arbitrator cannot find that the issues raised by Charter have been previously resolved.

Further, the Arbitrator agrees with Charter's contention that Verizon appears to be confusing the terms "issue" and "contract language." A determination of those issues that are resolved in arbitration is not based on whether the proposed contract language presented by the Petitioner in its Petition for Arbitration matches the most recent version discussed by the parties. Rather, the focus is on whether the petitioning party believes that the issues have been resolved.

The Arbitrator finds that Charter's Petition does not violate the negotiation and arbitration process mandated in federal law. The Arbitrator further finds that the Department has jurisdiction under 47 U.S.C. § 252 to arbitrate all of the issues raised by Charter in its Petition. As such, the Arbitrator finds that all of the issues raised by Charter in its Petition are open issues and appropriately before the Department for arbitration.

B. Timeliness of Claims

Verizon asserts that the sub-issues delineated by Charter in its Supplemental Petition are untimely. Charter did not respond to Verizon's assertions of untimeliness. The sub-issues were identified as a result of the discussion held at the procedural conference.<sup>5</sup> Specifically, at the procedural conference, the Arbitrator asked that Charter file a Supplemental Petition and provide additional discussion of the technical issues referred to in Charter's Petition. It was not that Charter had failed to identify these technical issues in its Petition, but that Charter did so in a somewhat cursory fashion. As a result of the Arbitrator requesting that Charter file a Supplemental Petition, Verizon asked permission to also file a Supplemental Petition, which the Arbitrator granted. In its Supplemental Petition, Verizon identified three additional issues.

The issues identified by both parties in the Supplemental Petitions were a result of the Arbitrator's decision to allow the filing of Supplemental Petitions. If Verizon determined that the Arbitrator's decision was inappropriate, it had the opportunity to appeal the decision to the Commission. Instead, Verizon, itself, filed additional issues to be resolved in the Arbitration. Therefore, Verizon's assertions that Charter's filing is untimely fails, and all issues identified by both of the parties in the Supplemental Petitions will remain for resolution in the Arbitration.

---

<sup>5</sup> The sub-issues identified by Charter are: 1) whether multiple terminals can be used in a ring configuration; 2) the time frame for noticing of upgrades or changes to fiber meet equipment; and 3) the manner in which each party will bear costs for expenses resulting from a relocation or other change required by a governmental or quasi-governmental agency.

IV. RULING

For the reasons set forth above, Verizon's Motion to Dismiss Charter's Petition for Arbitration and Verizon's Request to Strike the issues in Charter's Supplemental Petition are hereby denied.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

/s/  
\_\_\_\_\_  
Carol Pieper,  
Arbitrator

August 25, 2006  
\_\_\_\_\_  
Date